No. 92-1450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation,

Petitioners,

v.

CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

DONALD J. MCNEIL
Counsel of Record
LAWRENCE A. MANSON
DOROTHY VOSS WARD
JANET M. KYTE
KECK, MAHIN & CATE
77 West Wacker Drive
49th Floor
Chicago, Illinois 60601
(312) 634-7700

Attorneys for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 92-1450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation,

Petitioners,

v.

CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

The petitioners Cynthia Waters, Kathleen Davis, Stephen Hopper and McDonough District Hospital ("defendants") submit this reply brief in support of their request that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on October 15, 1992 and December 9, 1992.

INTRODUCTION

This case presents important and unresolved questions arising out of the tension between the right of public employees to engage in speech protected by the First Amendment and their employers' right to discipline them for speech not so protected. In *Connick v. Myers*, 461 U.S. 138 (1983), this Court held that a public employer need not "tolerate action which he *reasonably believe(s)* would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154 (emphasis added). Respondent Cheryl R. Churchill ("Churchill")[1] was terminated after defendants received reports that she had engaged in precisely this form of behavior during a conversation with a fellow employee. Churchill claims that the reports were erroneous and that she actually was engaged in protected speech on an issue of public concern. Below, she conceded that defendants never knew this before her termination, allegedly because of an inadequate investigation of the reports they received.

In her opposition to the petition, Churchill now contends that the reports could have referred to protected speech, and she says that a more thorough investigation would have disclosed the true nature of her speech. This is pure

---

[1] Since Churchill is the only active litigant of the two respondents, defendants will refer to respondents as "Churchill" throughout this brief.

speculation and irrelevant. In any retaliatory discharge action, the question before the court is what motivated the defendants when they decided to terminate the plaintiff. Here, there was no evidence that defendants were motivated by speech on matters of public concern because no such speech was reported to them. Defendants say the inquiry ends there; Churchill (and the Seventh Circuit) disagree. Either way, the issues raised by this case are of vital importance to all public employers, the Seventh Circuit's decision runs contrary to this Court's guidance in other First Amendment retaliatory discharge cases, and what guidance exists in other circuits as to these issues conflicts with the Seventh Circuit's holding.

In her haste to disagree with defendants and to agree with the Seventh Circuit, Churchill loses sight of the purpose of a petition for writ of certiorari and response thereto—to inform this Court as to why it should or should not hear the case. The question here is whether the Seventh Circuit's extraordinary holding (that defendants can be held individually liable *regardless* of what they knew of Churchill's speech at the time of termination) raises "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c). Churchill's brief contains no argument to the contrary.

REASONS FOR GRANTING THE WRIT

I.

The Reports on Which Defendants Relied Disclosed Only Unprotected, Insubordinate Speech.

Throughout her brief in opposition, Churchill contends that defendants "conceded" that the reports they received from Mary Lou Ballew ("Ballew") and Melanie Perkins-Graham ("Graham") could have referred to "protected

speech." Nothing could be further from the truth. In moving for summary judgment, defendants contended that Churchill's statements to Graham (including *Churchill's own version* of those statements) did not constitute protected speech because Churchill was not raising issues of public concern because they were of public concern. The district court granted summary judgment on this ground. For Churchill now to assert that defendants conceded that Churchill's speech could have been protected turns this case on its head.

Churchill cites deposition testimony in which defendants Hopper and Waters said they did not know what Churchill actually said to Graham (because they were not there). It is true that Churchill could have discussed cross-training with Graham during the conversation in which she also made the remarks reported to defendants. But defendants always have maintained that the content, form and context of Churchill's remarks to Graham rendered them unprotected, even if cross-training was one of the subjects discussed.

In the Seventh Circuit's view, defendants can be held liable if it is eventually determined that Churchill discussed issues of public concern, even if, based on the reports they received, defendants believed Churchill's comments were of the type held unprotected in *Connick*. Churchill's speculation—years later—as to how the reports might have been (but were not) construed does not support this extraordinary holding or make it less worthy of review by this Court.

Churchill spends considerable time describing her view of facts which are irrelevant to the questions presented for review. For example, she cites deposition testimony given long after her termination for the proposition that defendants should not have believed Ballew's and Graham's reports. But it was undisputed below that defendants *did*

believe these reports. Defendants have requested this Court's review because the Seventh Circuit held defendants can be held liable *even though* they believed the reports. Suggestions that Ballew did not hear the entire conversation or that Graham was nervous when interviewed by defendants have nothing to do with the issues raised here.

To the extent this Court might be influenced by the picture Churchill attempts to paint, it should be noted that she has misstated the facts. For example, she takes issue with defendants' position that they spoke to Ballew three times before the final termination decision was made. In her brief, Churchill concedes that two meetings took place. (Respondents' Brief in Opposition ("Resp. Brief"), p. 17 n.15). But she ignores the fact that Hopper had the Hospital's vice president of human resources interview Ballew one more time after the grievance meeting with Churchill. (Supp. A. 139-43, 147). During this meeting, Ballew once again confirmed the substance of her report to Waters regarding Churchill's negative comments about Waters and Davis. (*Id.*).

Churchill also misstates the facts when she contends that Ballew "heard only 50 seconds of what she thought was a 45 minute conversation." (Resp. Brief, p. 17). Ballew testified as follows at her deposition:

> Q. Now, you say the conversation took 45 minutes?
>
> A. At least.
>
> Q. All right. Now, do you have a second hand on your watch, Mr. Reporter?
>
> (Whereupon the reporter handed his watch to Mr. Bisbee.)
>
> Q. Okay. You heard Cheryl say that Cindy was out to get Cheryl fired. You heard Cheryl say that Cindy had complained about treatment that Cheryl gave a patient which Cheryl denied but

> Cindy persisted in her accusation. You heard Cheryl say that she disapproved of the check list. You heard Cheryl say that she always scheduled her own duty when three RNs were on board so that Cheryl would be less exposed to being called. You heard Cheryl complain that Cindy was not a good manager and didn't run the department well. Is that right?
>
> A. Those are the things I can specifically remember, yes.
>
> Q. All right. I want the record to reflect that my recitation of those things comprised 50 seconds. So, and you didn't report anything else to Cindy Waters, is that right, Mrs. Ballew?
>
> A. I reported that the general conversation was a tirade against the department.

(A. 906-07).[2] The only thing that took 50 seconds was Churchill's counsel's recitation of the (unprotected) subjects Ballew heard Churchill discuss with Graham.[3] There was no testimony that Ballew heard only 50 seconds of conversation.

Finally, Churchill disagrees with defendants' characterization of the reported comments as "insubordinate." Here again, the relevant point is that defendants *did* construe the reported speech as insubordinate, not that it might have been construed in a different way. Both the content of the reports and Ballew's and Graham's characterizations of what Churchill said were undisputed below. They supported defendants' belief that Churchill was engaging in speech of the kind found unprotected in *Connick*. The Seventh Circuit's holding that this belief was "immaterial"

---

[2] This is the section of the record cited in Respondents' Brief in support of the 50-second contention.

[3] Churchill's counsel's own summary of the comments overheard and reported by Ballew belies Churchill's assertion that the reports "could have referred to protected speech on matters of public concern."

if Churchill in fact spoke on an issue of public concern merits review by this Court.

II.

The Seventh Circuit's New Standard for First Amendment Retaliatory Discharge Actions Cannot Be Reconciled with This Court's Holdings in *Mt. Healthy* and *Connick*.

As Churchill readily concedes, this Court's First Amendment retaliatory discharge cases require that a plaintiff "show that his conduct was constitutionally protected, and that this conduct was a . . . 'motivating factor' in the [employer's] decision" to terminate him. *Mt. Healthy City School Dist. Board of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). In Churchill's (and the Seventh Circuit's) view, this means that a public employer may be held liable for retaliatory discharge even when the discharge is based on reports of unprotected speech—if it is later shown that the reports were inaccurate and that the employee actually spoke on protected matters of public concern. In light of *Connick*'s holding that public employers *can* terminate employees for unprotected speech, the Seventh Circuit's view of *Mt. Healthy* cannot stand. Otherwise, an employer motivated by what it believes is speech unprotected under *Connick* still can be held liable if it is mistaken as to the content of such speech. Such a result cannot be reconciled with *Mt. Healthy*'s requirement that the plaintiff show retaliatory intent on the part of the employer.

The other decisions of this Court cited by Churchill as consistent with the Seventh Circuit's view have nothing to do with the questions presented for review. For example, in *Speiser v. Randall*, 357 U.S. 513 (1958), this Court considered a challenge to California's requirement that veterans sign a loyalty oath in order to receive a state tax exemption. In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), this Court reviewed the method

used by a public employee union to determine the fees to be paid by non-member employees. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Court did have before it a First Amendment retaliatory discharge claim. But there, the Court rejected the theory, espoused by Churchill (and apparently by the Seventh Circuit), that a pre-termination hearing is required "as a *prophylactic* against non-retention decisions improperly motivated by exercise of protected rights." *Id.* at 575 n.14 (emphasis in original).

None of these cases establishes any standard of "due process" which public employers must meet before terminating employees based on reports of insubordinate speech. The Seventh Circuit's standardless duty to investigate finds no support here. And its holding that public employers can be held liable for retaliatory discharge without any retaliatory motive runs directly contrary to *Mt. Healthy*. Churchill's contention that the Seventh Circuit's view is supported by cases involving loyalty oaths and union dues is further evidence that this case presents an important and unresolved question.

This Court never has decided a case in which an employer acted on reports of speech which differed significantly from the actual speech alleged by the plaintiff. This is such a case. The parties disagree as to where *Mt. Healthy* leads when applied to such a scenario, but it cannot be disputed that the path is uncharted.

III.

No Circuit Court of Appeals Has Found That a Public Employer Must Investigate More Fully Than Defendants Did Here.

In her brief, Churchill says that all of the circuit court of appeals decisions cited by defendants can be distinguished on their facts. That is beside the point. None of these cases involves facts identical to those presented

here. But each sets forth a principle which conflicts with the Seventh Circuit's holding.

In *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989), the court held that a negligent investigation into the circumstances surrounding a public employee's termination "cannot form the basis for a First Amendment claim." *Id.* at 863. In *Atcherson v. Siebenmann*, 605 F.2d 1058 (8th Cir. 1979), the court held that a public employer has no duty to conduct an independent investigation before relying on reports by subordinates that a public employee engaged in unprotected speech. *Id.* at 1064. In *Sims v. Metropolitan Dade County*, 972 F.2d 1230 (11th Cir. 1992), the court found that an investigation need only "be thorough enough to support a reasonable person's conclusion that action based thereon would not violate clearly established law." *Id.* at 1234. In *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981), the court held that "[p]rima facie proof of a constitutional violation must include evidence of impermissible motive." *Id.* at 1193. In *Bell v. School Board of City of Norfolk*, 734 F.2d 155 (4th Cir. 1984), the court held that a plaintiff must prove "evil motive" to prevail in a First Amendment retaliatory action. *Id.* at 157.

Each of these holdings is consistent with defendants' view of *Mt. Healthy* and contrary to the Seventh Circuit's view. At the very least, the decisions in other circuits are likely to cause confusion which can only be resolved by this Court.

IV.

This Court's Decision in *Hunter v. Bryant*—Relied upon by Churchill—Supports Defendants' View of Qualified Immunity.

In her brief, Churchill merely parrots the Seventh Circuit's limited view of the scope of qualified immunity here. Like the Seventh Circuit, she ignores the requirement

that the right at issue be "clearly established" in light of the information possessed by the public official at the time he or she acts. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

Churchill is no more successful than the Seventh Circuit in finding any precedent for a "duty to investigate" here. This absence of precedent alone undercuts any assertion that the duty described by the Seventh Circuit was "clearly established." *Procunier v. Navarette*, 434 U.S. 555, 563-64 (1978). Nor does Churchill cite any case supporting the Seventh Circuit's view that defendants can be held liable "regardless of what [they] *knew*" [emphasis in original] and even if their lack of knowledge was "accidental." Indeed, the one additional case cited by Churchill holds to the contrary. *Hunter v. Bryant*, 112 S. Ct. 534, 536 (1991) (per curiam).

In *Hunter*, this Court reaffirmed *Anderson's* holding that a public official is entitled to qualified immunity if he "could have believed" that his actions were lawful, even if that belief was "mistaken." The Court held:

> Our cases establish that qualified immunity shields [public officials] from suit for damages if 'a reasonable [official] could have believed [his actions] to be lawful, in light of clearly established law and the information the [official] possessed.' *Anderson* . . . , 483 U.S. [at] 641. . . . Even . . . officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity. *Ibid.* Moreover, because '[t]he entitlement is an *immunity from suit* rather than a mere defense to liability,' *Mitchell v. Forsyth*, 472 U.S. 511, 526 . . . (1985), we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation. [Citations omitted].
>
> * * *
>
> [T]he court should ask whether the [officials] acted reasonably under settled law in the circumstances,

> not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.

Id. at 536-37 (emphasis in original).

The Seventh Circuit ignored all these principles in holding that for purposes of qualified immunity, "it is immaterial that the defendants were allegedly unaware of whether Churchill's speech was in regard to a matter of public concern." Accordingly, the Seventh Circuit's qualified immunity holding merits review by this Court.

CONCLUSION

For these various reasons, and for the reasons set forth in the petition for writ of certiorari, petitioners respectfully request that this Court grant the petition.

Respectfully submitted,

DONALD J. MCNEIL
Counsel of Record
LAWRENCE A. MANSON
DOROTHY VOSS WARD
JANET M. KYTE
KECK, MAHIN & CATE
77 West Wacker Drive
49th Floor
Chicago, Illinois 60601
(312) 634-7700

Attorneys for Petitioners